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No. 01-332

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF TECUMSEH PUBLIC SCHOOL DISTRICT *ET AL.*,
Petitioners,

v.

LINDSAY EARLS and LACEY EARLS, minors, by their next friends and parents, John David and Lori Earls, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF JUVENILE LAW CENTER; ADVOCATES FOR CHILDREN OF NEW YORK; CHILDREN & FAMILY JUSTICE CENTER; EDUCATION LAW CENTER-NJ; EDUCATION LAW CENTER-PA; JUSTICE POLICY INSTITUTE; JUVENILE JUSTICE PROJECT OF LOUISIANA; JUVENILE RIGHTS ADVOCACY PROJECT; NATIONAL CENTER FOR YOUTH LAW; THE SENTENCING PROJECT; UNIVERSITY OF THE DISTRICT OF COLUMBIA, JUVENILE LAW CLINIC; YOUTH LAW CENTER; AND LAW PROFESSORS THERESA GLENNON, MARTIN GUGGENHEIM, RANDY HERTZ, WALLACE J. MLYNIEC, FRANCINE SHERMAN & JOSEPH TULMAN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

The organizations and individuals submitting this brief work with and on behalf of adolescents, particularly young people in the education and justice systems. Some provide services directly to youth, some are engaged in research and some are associations of professionals who work with youth. *Amici* approach the issues in this case from a variety of perspectives - education, juvenile justice, child welfare, research and policy development - but are united in their concern about preserving respondents' civil rights. The school context alone does not justify mandatory, suspicion-less, urinalysis drug testing upon all participants in any school extra-curricular activity. *Amici* urge the Court not to abandon a suspicion-based standard for searches of public school students, and provide the Court with an extensive body of social science research about school safety.

Identity of Amici Curiae[2]

Juvenile Law Center; Advocates for Children of New York; Children & Family Justice Center; Education Law Center-NJ; Education Law Center-PA; Justice Policy Institute; Juvenile Justice Project of Louisiana; Juvenile Rights Advocacy Project; National Center for Youth Law; The Sentencing Project; University of the District of Columbia, Juvenile Law Clinic; Youth Law Center; and Law Professors Theresa Glennon, Martin Guggenheim, Randy Hertz, Wallace Mlyniec, Francine Sherman & Joseph Tulman.

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[1] *Amici* file this brief with the consent of all parties. Letters of consent have been lodged with the Clerk of Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

[2] A brief description of each of the organizations and individuals listed herein appears in the Appendix.

SUMMARY OF ARGUMENT

In 1995, this Court upheld a program for random urinalysis drug testing of student-athletes *upon finding* evidence that the school was in a "state of rebellion" and discipline actions had reached "epidemic proportions." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995). In the wake of *Vernonia*, Petitioner, the Tecumseh School District, decided to drug test almost its entire student body without actually suspecting that any particular student consumes illicit drugs. Given the careful line drawn by this Court in *Vernonia*, the Tecumseh School District is wrong to assume courts would endorse drug testing of students engaged in no dangerous activities and with no history of drug use.

Vernonia must not be interpreted as condoning anything but suspicion-less searches of student-athletes who are known to be leaders of a well-documented and extreme drug problem among the student body. When the unique circumstances of *Vernonia* are not present, an individualized suspicion standard, based upon this Court's holding in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), must be followed. In accordance with *T.L.O.*, a search of a public school student by a school official is constitutionally permissible only "when there are reasonable grounds for suspecting that the search will turn up evidence that the student had violated or is violating either the law or the rules of the school." *Id.* at 342.

Amici recognize that preserving an orderly school environment may entail easing restrictions to which searches by public authorities are ordinarily subject, *id.* at 339-40, but unsupported fear of student misbehavior does not justify abandoning the tenants of *T.L.O.* National statistics demonstrate that there has been a significant reduction in juvenile crime over the past several years. Nevertheless, isolated incidents of extreme violence have exaggerated the risk of school crime, and set into motion a string of "zero tolerance"

polices and procedures that fail to make schools safer and lead to the unnecessary exclusion of students from the educational process. Particularly where there is no allegation of school violence in Tecumseh, popular misconceptions about youth crime should not, at any level, justify a more restrictive than necessary formulation of Fourth Amendment rights.

ARGUMENT

I. INDIVIDUAL, SUSPICION-BASED SEARCHES OF STUDENTS BY PUBLIC SCHOOL TEACHERS SHOULD NOT BE ABANDONED IN FAVOR OF BLANKET, SUSPICION-LESS SEARCHES

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." This Court has held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *see Elkins v. United States*; 364 U.S. 206 (1960), including public school officials, *New Jersey v. T.L.O.*, 469 U.S. 325, 336-337 (1985). In *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617 (1989), the Court held that state-compelled collection and testing of urine, such as that required by the drug testing policy (Policy) enacted by the Tecumseh School District (Tecumseh), is a "search" subject to the demands of the Fourth Amendment.

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995). "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." *See Chandler v. Miller*, 620 U.S. 305, 315 (1997). Rare exceptions to this rule are warranted when the government establishes the existence of

"special needs." *See id.* Whether a particular search meets the reasonableness standard in these circumstances "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *See Vernonia*, 515 U.S. at 652-53. In order to "fit within the closely guarded category of constitutionally permissible suspicion-less searches," the government must show:

1. A "special need" or "finding of need" in the public school setting, which this Court has characterized as the "most significant element" in this analysis; and

2. That the nature of the privacy interest is outweighed by the nature of the intrusion, the nature and immediacy of the governmental concern, and nature and efficacy of the search.

See Chandler, 620 U.S. at 308; *Vernonia*, 515 U.S. at 652-53. The government's failure to carry its burden in making either one of these two showings is an independent basis upon which a court must strike down a mass, suspicion-less drug test as unreasonable.

Analysis demonstrates that the Tenth Circuit Court of Appeals held correctly that Tecumseh confronted a less emergent situation than the school district faced in *Vernonia*. Tecumseh overreacted by implementing its mass, suspicion-less drug-testing policy without first establishing that individualized, suspicion-based testing was not feasible. The testing was imposed upon every student who participated in an extra-curricular activity, including many non-athletes. This meant that the privacy interests intruded upon were greater than those at issue in *Vernonia*. These factors distinguish *Earls* from *Vernonia*, and establish a setting in which Tecumseh should not have abandoned individualized, suspicion-based testing in favor of blanket, suspicion-less ones. For these

reasons, Tecumseh's policy does not "fit within the closely guarded category of constitutionally permissible suspicion-less searches," and this Court should affirm.

A. The Policy Is Unconstitutional Because The Government Did Not Establish That Individualized, Suspicion-Based Searches Were Not Feasible Before Implementing Suspicion-Less Drug Testing Of Children That Participate In Extra-Curricular Activities.

In *Vernonia v. Acton*, 515 U.S. 646, 665 (1995), the Court upheld a public school's suspicion-less drug testing policy that applied to children who were participating in extra-curricular athletics. One of the most important issues in *Vernonia* was whether the school district established that the individualized, suspicion-based searches, which this Court upheld in *T.L.O*, 469 U.S. 325, were ineffective before resorting to suspicion-less searches. *See Vernonia*, 515 U.S. at 665, 678 (O'Connor, J., dissenting); *see also U.S. Supreme Court Official Transcript of Oral Argument, Vernonia v. Acton*, 1995 WL 353412, at * 14, * 15-17 (1995). Before upholding the searches in *Vernonia*, the Court rejected the argument that, where the school district faced an "immediate crisis" and "rebellion" caused by "a sharp increase in drug use," suspicion-based testing would be feasible. *See Vernonia*, 515 U.S. at 665. The Court concluded that "testing based on 'suspicion' of drug use would not be better, but worse" than suspicion-less group searches in this unique, crisis situation.[3] See *id.*

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[3] Recent experience with suspicion-less drug testing of children by public school officials has proven wrong the Court's conclusion that "testing based on 'suspicion' of drug use would not be better, but worse" than the suspicion-less searches, and justified the dissent's sharp disagreement. *See Vernonia*, 515 U.S. 646, 663-64, and 672 (O'Connor, J., dissenting). The Court was concerned the individualized testing would "generate[ ] the expense of defending lawsuits that charge such arbitrary

Although the Court warned "against the assumption that suspicion-less drug testing will readily pass constitutional muster in other contexts," *see Vernonia*, 515 U.S. at 665, the Court did not explicitly rule that a suspicion-less search would be held unconstitutional if the government did not first establish that individualized, suspicion-based searches were not feasible until *Chandler v. Miller*, 520 U.S. 305 (1997). There, the Court struck down a state law that required candidates for state office to pass a suspicion-less urinalysis drug test. The facts in *Chandler* lacked the "immediate crisis," "rebellion," and "sharp increase in drug use" that justified the suspicion-less searches in *Vernonia*. In fact, the Court observed that there was no evidence that a State officeholder had a drug problem or that such drug problems had ever at existed among this group. *See id.* at 319. The Court held that the suspicion-less search law was unconstitutional because the government "offered no reason why ordinary law enforcement methods would not suffice to apprehend such addicted individuals." *See id.* at 320.

The core of this holding is that in non-emergent, non-crisis situations, the government cannot overact. It must employ individualized, suspicion-based searches and, significantly, establish that they are not feasible before rolling out suspicion-less group searches. The latter are a category of "closely guarded" exceptions, and to hold otherwise would flip the exception and the rule on its head. *See Chandler*, 520 U.S. at 308, 325. To comply with *Vernonia* and *Chandler*, therefore,

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imposition, or that simply demand greater process before accusatory drug testing is imposed." *See Vernonia*, 515 U.S. at 663-64. In the name of reducing unnecessary litigation, the suspicion-less testing has resulted in clogged federal dockets in order to define what circumstances constitute a "special need." The Tenth Circuit observed this problem: in the suspicion-less search context, "the Supreme Court's special needs cases have engendered some criticism for failing to adequately define what a special need is." *See Earls*, at 1269 & n.3, *citing* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S. C. L. Rev. 258, 261 (Winter 2000).

the government must establish that individualized, suspicion-based searches are not feasible before suspicion-less searches can be implemented.[4]

Although *Chandler* did not explicitly require public schools to follow this rule, the Seventh Circuit Court of Appeals did. In *Willis by Willis v. Anderson Community Sch. Corp.*, 158 F. 3d 415 (7th Cir. 1998), the appeals court struck down suspicion-less drug testing of children by public school officials. The court observed that under *Vernonia*, "courts consider the feasibility of a suspicion-based search when assessing the efficacy of the government's policy." *Id.* at 421. Noting that, "the immediacy of the Corporation's concern does not rise to the level of that in *Vernonia*," the court struck down the suspicion-less, blanket searches because the suspicion-less tests addressed concerns that could have been "tackled by means of a traditional, suspicion-based approach." *Id.* at 423-24. "Particularly because the [school] has not demonstrated that a suspicion-based system would be unsuitable, in fact would not be highly suitable, we think the balance of our

[4] The Court has consistently followed this rule in other contexts. *See, e.g., Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (holding that because it is "not feasible to subject [customs] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments," a suspicion requirement is impractical for searches of customs officials for drug impairment); *Bell v. Wolfish*, 441 U.S. 520, 559 n.40 (1979) (holding that because observation needed to gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford," a suspicion requirement for searches of prisoners for smuggling following contact visits is impracticable); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) ("[A] requirement that stops on major inland routes always ... based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"). *See* J. Nathan Jensen, *Don't Rush to Abandon A Suspicion-Based Standard for Searches of Public School-Students*, 2000 B.Y.U. L. Rev. 695, 709 (2000).

'context-specific inquiry' tips in favor of [the students]." *Id.* at 424-25.

The same conclusion was reached in *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F. 3d 1052 (7th Cir. 2000). The absence of immediacy in *Joy* was clear: "[The school] simply has not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities." *Id.* at 1065. Citing *Chandler*, the appeals court held that "suspicionless drug testing without evidence of a drug problem by the targeted group should not be used if suspicion-based drug testing is possible." *Id.* "With respect to random testing of those who participate in extracurricular activities, we believe that, according to the methodology employed by the Supreme Court in *Vernonia*, there has been an inadequate showing that such an intrusion is justified."[5] *Id.*

The holdings in *Willis* and *Joy* recognize that different searches are constitutional in different contexts, and the adoption by schools of only suspicion-less searches, without any basis for the exception, are unreasonable. This seamlessly weaves *Chandler* into the school drug testing landscape, where, as this case demonstrates, it is much needed. Like the school districts in *Willis* and *Joy*, Tecumseh did not face the "drug crisis" or "rebellion" that distinguished *Vernonia*. Likewise, Tecumseh did not establish that individualized, suspicion-based testing was not feasible before it rolled out its suspicion-less, drug-testing regime.[6] This approach violates *Chandler* and

[5] Certain aspects of the drug testing policy were sustained only on the basis of *stare decisis*, under *Todd v. Rush County Schools*, 133 F. 3d 984 (7th Cir. 1998), in which the appeals court did not apply the *Vernonia* analysis.

[6] A school's drug testing policy is not insulated from review merely because it provides for individualized, suspicion-based testing. In *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Co. 1998), the policy

Vernonia as clearly as the search policies at issue in *Anderson* and *Joy*. Like the suspicion-less tests in *Chandler*, *Anderson*, and *Joy*, implementation of a suspicion-less Policy probably "[was] not needed," and its suspicion-based approach should not have been abandoned. *See Chandler*, 520 U.S. at 320.[7]

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at issue mandated drug testing for all students in grades six through twelve who wanted to participate in an extra-curricular activity. "In addition to the mandated testing, the Policy allows officials to test any student participating in an extracurricular activity based on a reasonable suspicion that the student is under the influence of illicit drugs/alcohol." *Id.* A more comprehensive drug-testing policy was at issue in *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 148 Ed. Law Rep. 985, (Cmwlth. Ct. 2000). There, five different types of drug testing were authorized by the policy. *See id.* at 654 & n.5. In each case, the appellate court scrutinized the policies under the *Vernonia* analysis, even though the policies both contained these provisions. That Tecumseh's policy authorizes individualized, suspicion-based searches, therefore, does not satisfy the requirements of *Vernonia* and *Chandler*.

[7] There is no basis to assume that individual suspicion-based searches are ineffective or unworkable in school settings. As this Court noted in *T.L.O.*,

> [Public school students] spend the school hours in close association with each other, both in the classroom and during recreational periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child.

Id. at 348 (Powell, J., concurring); *See also, Vernonia*, 515 U.S. at 678 (O'Connor, J., dissenting) ("In most schools, the entire pool of potential search targets--students--is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms." (citations omitted)). *See* J. Nathan Jensen, *Don't Rush to Abandon A Suspicion-Based Standard for Searches of Public School Students*, 2000 B.Y.U. L. Rev. 695, 709-710 (2000).

B. The Privacy Interests at Issue Here Are Greater than Those That Were Intruded upon in *Vernonia*.

To determine the nature of the privacy interests of the students who are compelled to undergo suspicion-less, blanket drug testing, courts must analyze two factors: (1) the context and (2) the students' relationship with the government. *See Vernonia*, 515 U.S. at 657. In *Vernonia*, the plaintiffs at issue were student-athletes, who have a lesser expectation of privacy than other students for several reasons. *See id.* First, these children "go out for the team" voluntarily. They also pursue athletic competition knowing that they "communally undress" in their locker rooms, which requires a lack of privacy. Most of the children must undergo a urinalysis and physical before they can take the field. Moreover, they voluntarily submit to regulations on fields and in arenas that do not apply to other children, which makes athletics more like a regulated industry. *See id.* While these factors accounted for the diminished privacy expectations of student-athletes, the Court held that these factors were limited to student athletes. The remainder of the student body does not "shed [its] constitutional rights...at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). *Vernonia*, therefore, distinguished between two groups of school children: the student-athletes who have a diminished expectation of privacy, and the remaining students who have a higher expectation of privacy.

This distinction has been cited by a growing majority of courts which have held that the higher privacy expectations of non-student athletes cannot be intruded upon by suspicion-less group drug tests as easily as the diminished privacy rights of the student-athletes in *Vernonia*. As one district court recently ruled,

> students subject to drug testing in the Lockney School District comprise a much broader segment of the

> student population than the group of student athletes in Vernonia. Their expectations of privacy are higher. Students who do not participate in athletics are not subject to the same daily 'communal undress' or public showering as student athletes; compulsory attendance at school is much different than voluntary participation in extracurricular activities. The Court, applying the reasoning of the Supreme Court in Vernonia, finds that the student body in the District holds a higher expectation of privacy than student athletes.

See Tannahill v. Lockney, 133 F. Supp. 2d 919, 929 (N.D. Tex. 2001).

The "Supreme Court pointed out that the student population as a whole enjoys a higher expectation of privacy than the student athletes subject to testing." *Tannahill*, 133 F. Supp. 2d at 928, *citing Vernonia*, 515 U.S. at 657. Thus, as the number of students who are compelled to take drug tests grows larger and includes increasing numbers of non-athletes, their expectation of privacy grows too. *See, e.g., Anderson*, 158 F. 3d 415, 421 (7th Cir. 1998); *Joy*, 212 F. 3d 1052, 1063 (7th Cir. 2000); *Brooks v. East Chambers Sch. Dist.*, 730 F. Supp. 759, 766 (S.D. Tex. 1989), *aff'd. without op.*, (5th Cir. 1991) (holding that "the law of the Seventh Circuit is different from and less protective of student rights than Fifth Circuit law"); *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 660, 148 Ed. Law Rep. 985 (Cmwlth. Ct. 2000) ("students who participate in extra-curricular activities do not have a diminished expectation of privacy"); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1107 (Co. 1998) ("*Vernonia* is limited to athletes, not all students who participate in extra-curricular activities").

In spite of these rulings, the Tenth Circuit Court of Appeals held that children who participate in non-athletic, extra-curricular activities *per se* have diminished privacy rights. *See*

Earls, 242 F. 3d 1264, 1276 (10th Cir. 2001). This holding overlooks the Court's distinction between the diminished privacy expectations of student-athletes and the higher expectations of non-athletes. *See Vernonia*, 515 U.S. at 657-58. And it cannot be squared with the reasons that gave rise to the Court's distinction. Of the Court's reasons for finding student-athletes have diminished privacy expectations, the Tenth Circuit held that non-student athletes who participate in extra-curricular activities have the same privacy expectations as the athletes because both groups of children voluntarily enter these activities and also have to follow rules. *See Earls*, 242 F. 3d at 1276.

These two reasons alone are not persuasive. Qualitatively, this Court's holding in *Vernonia* regarding the diminished privacy expectations of student-athletes makes sense because the drug tests require student athletes to perform only those tasks which the athletes already perform voluntarily: undergoing a urinalysis, which is required of athletes before they can play, and entering a bathroom, undressing and using the facilities, which athletes do every day before they take the field. *See Vernonia*, 515 U.S. at 617. By contrast, students who participate in non-athletic extra-curricular activities do not submit to preseason physicals, urinalyses or "communal undress" in locker rooms. *See id.* Forcing student non-athletes to undergo urinalyses coerces them into a loss of privacy that they did not voluntarily forfeit as the student athletes did. By obfuscating this distinction, particularly where *Vernonia* drew such a clear line, the Tenth Circuit Court of Appeals undermines this Court's holding that student do not "shed their constitutional rights ... at the schoolhouse gate." *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

C. The Nature Of The Intrusion Is Unreasonable Because Its Consequences Deprive Students Of The Opportunity To Learn, Earn Academic Credits, And Enroll In Classes.

Another fundamental difference between *Vernonia* and this case is the nature of the intrusion created by drug testing. In *Vernonia*, the Court defined the nature of the intrusion by the consequences of the search: the results of the drug tests are not used for any internal disciplinary function." *See Vernonia*, 515 U.S. at 658. "[T]he search here is undertaken for prophylactic and distinctly nonpunitive purposes." *Id.* at 658 & n.2. In light of these "purposes and consequences," the Court ruled that the nature of the intrusion was "not significant" or unreasonable. *Id.* at 659.

Although this Court stopped short of identifying the consequences that would be sufficiently intrusive to render a suspicion-less, group drug testing policy unconstitutional, one state supreme court struck down a policy that deprived a student of the opportunity to learn, earn academic credits, and enroll in classes. In *Trinidad*, 963 P.2d at 1098, a student who enrolled in a music class for academic credit was required to participate in the extra-curricular marching band in order to remain in this class. *See id.* at 1097 & n.2. One child refused to take the drug tests and, under the policy, he was not allowed to participate in the band. Consequently, he could not remain enrolled in the music class. *See id.* (testimony of Lopez and the band director). Underscoring these harsh consequences, the Colorado Supreme Court struck down the policy as unconstitutional, noting that "In our view, the type of voluntariness to which the *Vernonia* Court referred does not apply to students who want to enroll in a for-credit class that is part of the school's curriculum." *Id.* at 1107.

This conclusion is consistent with *Vernonia* and should be reached here. Like the policy in *Trinidad*, Tecumseh's policy

deprives students of the opportunity to learn, earn academic credits, and enroll in classes if they refuse to submit to drug testing. The district court in *Earls* found that "some faculty members give extra credit to students who participate in certain activities." *See Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.*, 115 F. Supp. 2d 1281, 1292 (W.D. Okla. 2000). One teacher admitted that "participating in livestock competitions 'can only help the grade, not hurt it'" through extra-credit points. *See id.* at 1292 & n.45. The district court also found that:

> students enrolled in [this teacher's] agriculture classes can earn extra credit, and thus improve their grades, by competing in livestock shows. [This teacher] further testified that teachers "strongly encourage" all agriculture students to be members of the FFA [Future Farmers of America], and to compete in the FFA shows so that they can apply what they have learned in the agriculture class.

Id., at 1292 & n.44 (internal citations omitted).

Tecumseh's Policy also submits students enrolled in academic classes linked to student activities to drug testing, as was the case in *Trinidad*. For example, choir class is a course offered as part of the school's regular curriculum. *See Earls*, 115 F. Supp. 2d at 1291-93. A student can enroll in choir, however, only if she satisfies the school's requirement that she participate in extra-curricular choir activities provided by the school. *See id.* If the student does not participate in extra-curricular choir, she cannot enroll in the academic choir class. *See id.* The consequences of refusing to submit to drug testing, therefore, affect more than voluntarily, non-academic activities: it effectively violates the school's pre-requisite for enrolling in the academic class, which prohibits the student from enrolling in the academic class. *See id.*

Although these findings smack of an unreasonable intrusion, they were not meaningful to the district court in *Earls*. Relying on the school principal's verbal assurance and a provision in the Policy providing that no "academic sanctions will be imposed for violations of this policy," the court ruled that Tecumseh's approach has been to "allow students refusing to consent to drug testing to remain in the corresponding class. *See Earls*, 115 F. Supp. 2d at 1292. The court also ruled, "there is no evidence that students who refuse to consent to drug testing are treated any differently with regard to extra credit than any other non-competitors, or that any students' grades have been lowered because of their refusal to consent to drug testing." *Id*. The appeals court did not address this issue.[8]

These conclusions overlook the crux of *Vernonia's* holding regarding the nature of the intrusion: if the only consequence of a refusal to take a test is the lost opportunity to participate in a voluntary athletic activity, then the intrusion created by the drug test is "not significant." *See Vernonia*, 515 U.S. at 659. However, if a refusal to take a drug test deprives children of a learning opportunity or a chance to improve his or her grades, then this consequence is "significant" and the policy is too intrusive under *Vernonia*. *See Trinidad*, 963 P.2d at 1098. This rule should apply here with equal force: it is undisputed that if students refuse to submit to drug tests, then they cannot participate in the Future Farmers of America (FFA). *See Earls*, 115 F. Supp. 2d at 1291-93. This deprives students of the opportunity to acquire skills and learn lessons from FFA that are directly related to the curriculum in agriculture class. Thus, the district court's emphasis that students can remain enrolled in agriculture class after being removed from FFA overlooks

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[8] It noted, "There are no academic sanctions imposed." *See Earls v. Bd. of Educ. of Tecumseh Public Sch. Dist.*, 242 F. 3d 1264, 1286 (10th Cir. 2001).

the lost opportunity to learn from FFA.

Equally misguided is the district court's conclusion regarding extra-credit. The Tecumseh teacher testified that even though a student who cannot participate in FFA cannot have his or her grade "lowered," the student in fact loses the opportunity to raise his grade. *See id*. at 1292 & n.44-45. The consequence is that students who refuse to submit to testing lose an opportunity to improve a grade merely for refusing to take the drug test. Losing this opportunity could result in a lower overall grade average for a student. These consequences, far from merely losing the opportunity to play football or baseball, are "significant." *See Vernonia*, 515 U.S. at 659. These are precisely the type of intrusions that concerned the Court in *Vernonia*, and that the Colorado Supreme Court sought to prohibit in *Trinidad*, and that the Court should now hold are unreasonable.

D. The Tenth Circuit Correctly Held That The School District's Concern Is Not Immediate Because There Is No Illegal "Drug Crisis," "Rebellion" Or Dramatically Increased Drug Problem In Tecumseh's Schools.

In the balancing analysis set forth in *Vernonia*, courts must assess the immediacy of the governmental concern. In *Vernonia*, the immediacy was clear: "[T]eachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it." *Vernonia*, 515 U.S. at 648. "The administration was at its wits end and…[t]he coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse …." *Id*. at 649. The Court held that

this finding of need and immediacy was the "most significant element" in a case where the "government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care" are implicated. *See Vernonia*, 515 U.S. at 665.

Such immediacy does not exist in *Earls*. As the Tenth Circuit observed:

> the evidence of drug use among those subject to the Policy is far from the 'epidemic' and 'immediate crisis' faced by the Vernonia schools and emphasized by the Supreme Court's opinion. The district court in this case admitted as much: '[a]dmittedly the evidence in this case does not show an epidemic of illegal drug use in the Tecumseh School District.' [citation omitted] Rather, the evidence of actual drug usage, particularly among the tested students, is minimal."

See id. at 1272. Noting the absence of some element of immediacy to the government's concern, the Tenth Circuit stuck down the Policy because of "the *paucity* of evidence of an actual drug abuse problem among those subject to the Policy." *See Id.* at 1277-78 (emphasis added).

This holding is consistent not only with this Court's decision in *Vernonia*, but also with the majority of federal and state court decisions that applied the immediacy of the governmental concern prong of *Vernonia's* suspicion-less search analysis. In *Joy*, 212 F. 3d at 1065, the appeals court ruled that under *Vernonia* analysis, aspects of the suspicion-less searches were unconstitutional because the school "simply has not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities."[9] *See id.*

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[9] *See* note 9, *supra*.

In *Brooks v. East Chambers Sch. Dist.* , the Fifth Circuit Court of Appeals affirmed a decision to strike down a suspicion-less drug testing policy. The appeals court held that, "In fact, school authorities could not cite a single drug-related injury in seven years, in the course of either school or after school activities." *Brooks,* 730 F. Supp. at 764. There was "no evidence" of immediacy, and the policy was struck down. *Id.* at 761.

In *Tannahill v. ex rel. Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001), the district court struck down a suspicion-less drug testing policy where "there existed 'very little evidence that drug or alcohol abuse by [the district's] students constituted a major problem in the operation of the schools.'" *Id.* at 924. Without any evidence of immediacy, the court held that the school district was doing that which was constitutionally impermissible: "responding with its [policy] to a perceived public demand that the schools 'do something' about the general societal problem." *Id.*

The facts in these cases sharply contrast those in *Vernonia*, and elsewhere, in which public school administrators and teachers were confronted with genuine emergencies. When the school officials responded to these genuine emergencies, by implementing suspicion-less searches, they were sustained. Findings of immediacy in public schools have included incidents of violence involving guns, knives, other weapons, or some violent threat to the children. *See, e.g., Thompson v. Carthage Sch. Dist.*, 87 F. 3d 979 (8th Cir. 1996) (sustaining searches because of the abundance of evidence that the school had a serious, documented weapons problem that threatened the lives of the students); *In re F.B.*, 726 A.2d 361 (Pa. 1999) (acknowledging that although a "pat down" intrudes on a student's legitimate expectation of privacy, the immediate threat that weapons were present in school justified the searches under the *Vernonia*); *In Interest of S.S.*, 452 Pa. Super. 15, 680 A.2d 1172 (Pa. Super. 1996) (sustaining student searches due

to the high rate of weapons-related violence in Philadelphia's public schools).

Vernonia has not been applied reflexively, however, to uphold suspicion-less, mass searches whenever a school official suspects that a weapon might be present. On the contrary, in the weapons context the *Vernonia* analysis has proven sensitive enough to distinguish between perceived immediacy and genuine "findings of need" that concern weapons. In *Thomas v. Roberts*, 261 F. 3d 1160, 1169 (11th Cir. 2001), a suspicion-less strip search of schoolchildren was struck down under *Vernonia*. The Eleventh Circuit Court of Appeals held, "[n]or is this a case where…school officials receive[d] information that an unidentified student [was] carrying a weapon or other dangerous article on school property, therefore requiring a generalized search to avoid an immediate threat of physical harm to students, faculty, or staff." *See id.* Recognizing that some immediacy was necessary to justify a suspicion-less search of children in the public school setting, the court held that the searches were unconstitutional under *Vernonia*.

This was the approach was adopted by the Tenth Circuit in *Earls v. Tecumseh*:

> the evidence of drug use among those subject to the Policy is far from the "epidemic" and "immediate crisis" faced by the Vernonia schools and emphasized by the Supreme Court's opinion. The district court in this case admitted as much: "[a]dmittedly the evidence in this case does not show an epidemic of illegal drug use in the Tecumseh School District."

See Earls, at 1272-73. Tecumseh's officials were not faced with a knife-slashed bus seat in the midst of a serious, documented weapons problem, as was the case in *Thompson*, 87 F. 3d 979. Nor were the officials facing an alarming rate of weapons-related violence in their public schools, as was the

case in *In Interest of S.S.*, 452 Pa. Super. 15. Most importantly, the immediacy that was present in *Vernonia* does not exist here. In sum, the lack of any immediacy or "finding of need" on this record clearly distinguishes this case from *Vernonia*.[10] In these non-emergent circumstances, Tecumseh should not have abandoned its individualized, suspicion-based searches in favor of mass, suspicion-less searches.

II. AN INFLATED FEAR OF SCHOOL VIOLENCE DOES NOT JUSTIFY MASS, SUSPICION-LESS SEARCHES FOR NON-VIOLENT BEHAVIOR

Despite official crime statistics that show youth crime rates falling significantly,[11] *fear* of out-of-control children has

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[10] The only authority supporting a finding of immediacy on the record in *Earls* is *Miller by Miller v. Wilkes*, 172 F. 3d 574 (8th Cir. 2000). There, the appeals court noted,

> there is not the same immediacy here as there was in Vernonia, and this is where the facts before us differ most significantly from those the Supreme Court faced when declaring Vernonia's drug testing policy constitutional. There is no 'immediate crisis' in Cave City Public Schools, indeed there is no record evidence of any drug or alcohol problem in the schools…

Id. at 580-81. In spite of these findings, the appeals court held that "'the considerable risk of immediate harm once the problem surfaces' is enough" immediacy to sustain the policy. *Id.* This holding is irreconcilable with *Vernonia*, where the Court held that "findings of need" or immediacy is the "most significant element" where the "government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care" are implicated. *See Vernonia*, 515 U.S. at 665. As a result, *Wilkes* should not be applied here to reverse the appeals court's decision.

[11] Since 1997, youth crime in Oklahoma has fallen 20 percent. State of Oklahoma, Uniform Crime Report, Annual Report 2000, Oklahoma State Bureau of Investigation, at 65-66 (2001), www.osbi.state.ok.us/crimestats. Official Oklahoma crime statistics show that crime by juveniles (persons under age 18) today is less frequent than ten years ago. *Id.* (comparing juvenile arrest totals between 1991 and 2000). In 2000, juveniles only accounted for 15.6% of all persons arrested for all crimes in Oklahoma.

increased dramatically over the past several years and driven the *misperception* that school violence is on the rise and associated with drug use. The widespread reporting of rare but dramatic occurrences of school shootings perpetuate frightening and cynical stereotypes about adolescents. Such reports have caused alarmed parents and other community members to think violence in the schools is more common than it is. *See* Tamar Lewin, *Despite Recent Carnage, School Violence Is Not on the Rise,* Dec. 3, 1997, N.Y. Times, at A.16; *see also* Vincent Schiraldi & Jason Ziedenberg, *How Distorted Coverage of Juvenile Crime Affects Public Policy, in Zero Tolerance: Resisting the Drive for Punishment in Our Schools* (William Ayers *et al.*, eds., 2001) [hereinafter *Zero Tolerance*] (media coverage of juvenile crime is badly skewed toward violent, idiosyncratic acts, and presented out of context).

Unfortunately fear of school violence is far greater than violence itself. Although the overall risk of violence and injury at school has remained low and has not changed substantially over the past twenty years, parents report being increasingly apprehensive about their schools. A recent Gallup poll found that nearly half of the parents surveys feared for their children's safety when they sent them off to school, where as only 24 percent of parents reported this concern in 1977. Gallup Organization, *Parents of Children in K-12* (August 24-26,

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Id.

More broadly, there has been a continuing decline nationwide in the rate and number of youth arrested for serious violent offenses (criminal homicide, robbery, aggravated assault and forcible rape). U.S. Dep't. of Justice, Fed. Bureau of Invest., *Crime in the United States: Uniform Crime Reports* (2000, 1998, 1993). Juvenile homicide rates, in particular, have dropped 56 percent from 1993 through 1998. *Id.* All totaled, there has been a 30 percent drop in the total juvenile crime rate. *Id.*; *See also* U.S. Dep't. of Health & Human Services, *Youth Violence: A Report of the Surgeon General*, 17-31 (2001).

No evidence suggests Tecumseh diverges from these state and national trends.

1999). In May 1999, shortly after the shootings at Columbine High School in Littleton, Colorado, 74 percent of parents said that a school shooting was very likely to happen in their community, Gallup Organization, *1025 Adults*(May 7-9, 1999), even though a student has a greater chance of being killed by lightening than by school violence.

In response, school officials are increasingly taking on the issues of school security in a heavy-handed manner. Random drug testing of high school students has proliferated[12] since 1995 when this Court upheld Vernonia's random drug testing policy targeting interscholastic athletics. Such policies, once considered the last resort of frustrated school officials to address serious drug crises in school, 515 U.S. at 649, have now become popular as "necessary" measures. *See* Brief of *Amici Curiae* in Support of Petitioners, National School Board Assoc. *et al.*, at 4 (supporting drug testing because "[o]ne of the most troubling problems with which public schools have had to contend in recent years has been ... the number of violent acts committed at school"); *see also* Brief of *Amici Curiae* in Support of Petitioners, Washington Legal Foundation *et al.*, at 4 ("drug use is strongly correlated to ... violent conduct"). While the use of such strategies seems temptingly effective in combating drug use among teens, the foundation for mass, suspicion-less searches - namely concern for school safety - is belied by research showing that schools are safe and that violence remains an aberration of youthful behavior. More importantly, there is scant evidence nationally linking drug use with school violence, and none whatsoever in Tecumseh. A school district's desire to foster drug abstinence in an environment where there is neither a history of drug use nor

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[12] *See* Brief of *Amici Curiae* in Support of Petitioners, Drug-Free Schools Coalition *et al.*, at 6 & n.3 (citing numerous federal and state court decisions since 1995 reviewing drug and alcohol testing in schools).

violent/criminal activity must not be permitted to make suspicion-less searching become the norm rather than the exception.

A. The Perception That Schools Are Increasingly Violent and That Our Children and Teachers Are Not Safe Is at Odds With Evidence Showing That Schools Are Among the Safest Places to Be.

"America's schools are among the safest places to be on a day-to-day basis." Richard W. Riley & Janet Reno, Introductory Letter to U.S. Dep't. Of Educ. & U.S. Dep't. Of Justice, *Early Warning, Timely Response: A Guide to Safe Schools*, Introduction (1998). By virtually every measure, school crimes are declining. School deaths, the most arresting measure, are very low. "[T]rends throughout the 1990s show that the number of school homicides has been declining." U.S. Dep't of Health and Human Services, *Youth Violence: A Report of the Surgeon General*, 31 (2001). Two nationwide studies of school homicides conducted by the Centers for Disease Control and Prevention in collaboration with the U.S. Departments of Education and Justice concluded that between 1992 and 1999 *school-associated* homicides were less than 1 percent of all homicides among school-age children. *Id.* (emphasis added); *see also* The National School Safety Center, *School Associated Violent Deaths* (Aug. 1999).

Less serious crime in schools has also decreased. Between 1993 and 1999, student reports of physical fights on and off school grounds declined, as did the number of students reported as having brought a gun to school. Nancy D. Brener *et al.*, *Recent Trends in Violence- Related Behaviors Among High School Students*, 282 Journal of the American Medical Association 440-446 (1999). During this same period, non-fatal school crimes in general have decreased: total number of reported school crimes decreased 29 percent; serious violent crimes decreased 34 percent; violent crimes decreased 27

percent; and thefts decreased 29 percent. P. Kauffman *et al.*, U.S. Dept's. Of Education and Justice, *Indicators of School Choice and Safety* (1998 & 2000).

Because rare school shootings broadcast by the media are so horrific, school boards are overreacting.[13] The conclusions of separate surveys of school administrators and high school students - groups at the ground level - suggest a very different school environment than the unsafe one perceived by parents. In *Violence and Discipline Problems in U.S. Public Schools , 1996-1997*, the National Center for Education Statistics (NCES) surveyed a nationally representative sample of 1,234 school principals and disciplinarians at the elementary, middle and high school levels. S. Heaviside *et al.*, U.S. Dep't. of Education, Nat'l Ctr. for Educ. Statistics, *Violence and Discipline Problems in U.S. Public Schools, 1996-1997* (1998, NCES 98-030). When these principals were asked to list what they considered serious or moderate problems in their schools, the most frequently cited problems at all levels were the less violent behaviors such as tardiness (40%), absenteeism (25%), and physical conflicts between students (21%). The critical incidents that are typically the focus of school safety debates were reported to be at least "a moderate problem" only relatively infrequently: drug use (9%), gangs (5%), possession of weapons (2%), and physical abuse of teachers (2%). The NCES report found that violent crime occurred at an annual rate

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[13] Tecumseh's drug policy would not have prevented the widely reported, and most-fear-inducing school shootings in West Paducah Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; and Littleton, Colorado. None of the student-shooters in those instances reportedly took or used drugs. Schools seeking to employ suspicion-less searches of virtually all students for any and all illicit drug use in order to minimize violence should establish a causal connection between the two. Constitutional imperatives that protect individual rights must not give way to solutions that offer merely cosmetic security.

of only 53 per 100,000 students.[14]

Opinion surveys of high school students also support the fact that schools are safe. Ironically, "[t]oday's high school seniors are no more likely than their parents were to be assaulted, injured, threatened or robbed in high school," according to researchers from the Justice Policy Institute. *See* Vincent Schiraldi *et al.*, Justice Policy Institute, *Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions* (2001) <http://www.cjcj.org/sss>. Each year since 1975, researchers from the University of Michigan's Institute for Social Research have conducted the *Monitoring the Future* survey for the United States Justice Department.[15] The survey asks approximately 3,000 high school seniors annually a series of questions about the types of victimization, if any, they have experienced over the past 12 months, in or near school or on a school bus. From 1976 to 1998, between 94% and 95% of students reported that they had not been injured or threatened with injury with a weapon at or near school. The Class of 1998 was only slightly more likely to report being injured or threatened with injury, or to have experienced property damage

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[14] Comparisons of the current NCES survey data with results from an earlier survey of public school principals conducted in 1991 show virtually no changes across either minor misbehavior or more serious infractions. Noted school violence researcher, Irwin Hyman, tracked a number of indicators of school violence over the past 20 years and concluded, "As was the case 20 years ago, despite public perceptions to the contrary, the current data do not support the claim that there has been a dramatic, overall increase in school-based violence in recent years." Irwin A. Hyman and Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 30 Journal of School Psychology 7, 9 (1998); *see also* Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372 (1999).

[15] *Monitoring the Future* survey results are reported annually in Ann Pastore & Kathleen Maguire, eds., U.S. Dep't. Of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics*.

or theft than the Class of 1976. *See* U.S. Dep't. of Health & Human Services, *Youth Violence: A Report of the Surgeon General*, 31 (2001).

By way of comparison, the *out-of-school* rate of death for children is approximately forty times greater. Melissa Sickmund *et al.*, U.S. Dep't. of Justice, *Juvenile Offenses and Victims: 1997 Update on Violence, Statistics Summary* (1997). Put another way, 99 percent of the violent deaths of children occurred *outside* of school grounds between 1992 and 1994. *Id.* Finally, 90 percent of all childhood deaths take place in or near *home*, not in school, and they take place *after* school. Elizabeth Donohue *et al.*, Justice Policy Inst., *School House Hype: The School Shootings, and the Real Risks Kids Face in America* (1999) <http://www.cjcj.org/sss>.

B. If Permitted, Generalized Drug Testing of Every Public School Student Will Become As Routine & Inflexible as Other "Zero Tolerance" Measures That Punish Children By Depriving Them of School Involvement.

Misperceptions about safety in our schools have led schools to enact "zero tolerance" rules that punish the misbehavior of children by depriving them of school involvement.[16]

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[16] The term "zero tolerance" refers to those policies which deal out severe punishment for all offenses, no matter how minor, ostensibly in an effort to treat all offenders alike in the spirit of fairness and intolerance of rule-breaking. *See, e.g.*, Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372 (1999) (discussing the origins of zero tolerance); *see also* Russell Skiba, Indiana Educational Policy Center, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* (Aug. 2000). The use of zero tolerance policies began with federal and state court drug enforcement agencies in the early 1980s. By 1988, these programs had received national attention when the U.S. government allowed customs agents to seize the boats, automobiles and passports of any persons crossing American borders who were found with even trace amounts of

Tecumseh's drug testing policy is a typical example that, if upheld, will advance to other school districts as rapidly as other symbolic "get tough" measures.

Since passage of the Gun Free Schools Act, *supra*, some form of zero tolerance policy has become the norm in public schools.[17] Local school boards have broadened zero tolerance policies beyond the federal mandates of weapons, to include more types of behavior (e.g. drugs, alcohol, threats or swearing). Absurd consequences of this one-size-fits-all mentality have been reported in the past several years. In West Virginia, a seventh grader who shared a zinc cough drop with a classmate was suspended for three days pursuant to the school's anti- drug policy because the cough drop was not cleared with the office. In North Carolina, a six-year-old kissed his classmate (he claimed she asked him to do so); he was suspended for one day for violating the school's rule which precluded "unwarranted and unwelcome touching." In

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drugs. The U.S. Customs Agency finally halted its policy in 1990.

In 1993 school boards across the county began adopting zero tolerance policies. In 1994 the federal government stepped in to mandate the policy nationally with passage of the Gun Free Schools Act into law. 20 U.S.C. § 8921. The law mandates a one calendar year expulsion for possession of a firearm *and* referral to the criminal or juvenile justice systems. Originally the law covered only firearms, but more recent amendments have broadened the language to include *any* instrument that may be used as a weapon. The zero tolerance policies in schools now embrace not only the issues addressed by the Gun Free Schools Act, but are also used to discipline students who "disrupt" classes, *infra*.

[17] Defining zero tolerance as a policy that mandates predetermined consequences or punishments for specified offenses, the National Center for Education Statistics report, *Violence & Discipline Problems in U.S. Public Schools: 1996-1997*, found that 94% of all schools have zero tolerance policies for possession of weapons or firearms, 87% for possession of alcohol, while 79% report mandatory suspensions or expulsions for violence or possession of tobacco. S. Heaviside *et al.*, *supra*.

Louisiana, a second-grader brought his grandfather's watch to school for show and tell. The watch had a one-inch-long pocketknife attached; pursuant to the school's weapons policy, the child was suspended and sent to an alternative school for a month. Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance: Can Punishment Lead to Safe Schools?* 80 Phi Delta Kappan 372 (1999). The ubiquity of these trivial incidents across time and location suggests that the over-extension of school sanctions to minor misbehavior is not anomalous.

It is not the goals of zero tolerance, but the methods of its implementation that deserve scrutiny; methods that unreasonably abandon individual, suspicion-based searches. *See generally*, Part I, *supra*. For example, as a barrier to participating in extra-curricular activities, Tecumseh's drug-testing program does more harm than good because it deprives students of involvement in school and school-related activities. *See also* Part IC., *supra* (Tecumseh Policy unreasonable for depriving students opportunity to learn and earn academic credits). The classic zero tolerance strategy of punishing minor or even trivial events severely, or dramatically extending the length of school suspension or expulsion, has led to a severe and problematic result: many children are missing out on the education their schools are providing.[18] If the Tecumseh school board wants to protect youth and promote further reductions in youth crime, it should keep schools open late, fill them with exciting programs and activities, add healthy food and academic

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[18] Efforts to address school safety have swept millions of school children into a net of exclusion from educational opportunities. Despite relatively stable rates of assaults with and without weapons in schools nationwide over the past 23 years, suspensions and expulsions are at record highs. Between 1974 and 1998, the rate at which students were suspended and expelled from schools has almost doubled from 3.7% of students in 1974 (1.7 million suspended), to 6.8% of students in 1998 (3.2 million suspended). Lloyd Johnston *et al.*, U.S. Dep't. Of Education, *Projected Student Suspension Rate for the Nations's Public Schools* (2000).

support, and help their working parents. Although youth crime was down by 50 percent over the past four years, most youth crime occurs *after* school and *outside* school, in the hours from 3 to 6 p.m. William Ayers *et al.*, *Introduction*, at xiii *in Zero Tolerance*.

Implementing mass, suspicion-less drug testing is also questionable and deserving of scrutiny out of concern that the school district's record-keeping about drug use, an illicit activity, makes students susceptible to prosecution in the juvenile and criminal justice systems. Schools should not be encouraged to become additional sources of referrals to these systems. Admittedly, Tecumseh's drug testing policy does not require prosecutorial referral of students who test positive for drug use, but law enforcement notification is conceivable, and likely, considering the Gun Free Schools Act, 20 U.S.C. § 8921, already requires police department notification for any instance of weapons possession in schools.

The harsh punishments of zero tolerance have come under increasing criticism as arbitrary, unfair and unreasonable. The legal profession joined the chorus in February 2001, when the American Bar Association voted to recommend ending zero tolerance policies for school discipline. The report submitted with the recommendation stated that "zero tolerance has become a one-size-fits-all solution to all the problems that schools confront ... [and has] redefined all students as criminals with unfortunate consequences."

Defenders of zero tolerance policies point to the larger threat posed by serious violence in schools, suggesting that civil rights violations may be an unfortunate but necessary compromise to ensure the safety of school environments. However, this argument is made moot by the almost complete lack of documentation linking zero tolerance with improved school safety. Despite more than ten years of implementation, there have been only a handful of studies evaluating the

outcomes of security measures. Of these, only school uniform research appears to have enough support to be considered even promising in contributions to perceptions of safer school environments. The most extensive studies suggest a negative relationship between school security measures and school safety. Russell Skiba, Indiana Educational Policy Center*Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, at 15 (Aug. 2000). With an almost complete lack of evidence that zero tolerance methods work, less intrusive alternatives for preserving school safety must be used by school officials.

CONCLUSION

For the foregoing reasons *Amici Curiae*, Juvenile Law Center *et al.*, respectfully request that the judgement of the U.S. Court of Appeals for the Tenth Circuit be affirmed.

Respectfully Submitted,

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APPENDIX - Identity of *Amici*

Juvenile Law Center

Juvenile Law Center (JLC) is one of the oldest legal service firms for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC is a non-profit public interest firm. Legal services are provided at no cost to our clients.

Advocates for Children of New York

Advocates for Children of New York (AFC) has worked for over 25 years to secure quality and equal public education for children at greatest risk for school-based discrimination and/or academic failure. AFC provides individual case advocacy, technical assistance, and training for parents, students and professionals about children's educational needs and the means of meeting them. AFC engages public policy makers in strategies to modify procedures and practices that negatively impact on young people's academic success. AFC also conducts in-depth analyses of issues affecting academic achievement. Its experience as both researcher and advocate in the field of education allow AFC to provide informed commentary on the policy at issue here. Its offices are in

New York, NY.

Children and Family Justice Center

The Children and Family Justice Center is a holistic children's law center, a clinical teaching program at Northwestern University School of Law's Legal Clinic and a research and policy center engaged with a major urban court, the Juvenile Court of Cook County, in its effort to transform itself into an outstanding and vital community resource. The Northwestern University Legal Clinic has represented children in juvenile and criminal proceedings since its founding in 1969. Today, seven clinical staff attorneys provide legal representation for poor children, youth, and parents in a wide variety of matters, including juvenile delinquency, juvenile transfer, criminal, domestic violence, abuse and neglect, adoption, custody, special education, school suspension and expulsion, immigration and political asylum, and appeals. The staff attorneys supervise second and third year law students in the representation and team with the Center's social worker and the social work students whom she supervises.

Education Law Center-NJ

The Education Law Center (ELC-NJ) is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC-NJ has acted on behalf of disadvantaged students and students with disabilities to achieve education reform, school improvement and protection of individual rights. ELC-NJ seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children who are the plaintiffs in New Jersey's school funding case, *Abbott v. Burke*, ELC-NJ provides a full range of direct legal services to parents involved in disputes with public school officials. ELC-NJ serves approximately 600 individual

clients each year, primarily in the area of special education law.

Education Law Center-PA

ELC-PA is a private, non-profit public interest law firm and advocacy organization dedicated to helping Pennsylvania's children obtain a quality education. ELC-PA focuses on the needs of children who are poor, of color, diabled, or otherwise disadvantaged. For more than twenty years, ELC-PA has worked towards improving the quality of public education for students in Pennsylvania through the provision of advice, training, publications and technical assistance to attorneys and advocates, as well through co-counseling and representation of clients in the courts and before administrative and legislative bodies. ELC-PA has participated as amicus curiae in the Pennsylvania Supreme & Superior Courts, as well as this Court.

Juvenile Justice Project of Louisiana

Founded in 1997, the *Juvenile Justice Project of Louisiana* (JJPL) has established itself as a partner in efforts to reform Louisiana's juvenile justice system. We have dedicated ourselves to advocating not only for more effective less expensive alternatives to incarceration, but also for the zealous and effective representation of children in the juvenile justice system. We believe that children in the adjudication stage of proceedings should be afforded all the Fourth Amendment rights afforded adults. Particularly in these times when there are collateral consequences to many juvenile adjudications, a juvenile's right to privacy should be protected. It should not be eroded purely on the grounds of the inaccurate perception that schools are a dangerous place. JJPL is committed to challenging all applications of law that erode students' right to privacy in schools. In order for children to grow and thrive, schools must respect and protect the individual rights of their students just as jealously as those same rights are safeguarded for adults.

Justice Policy Institute

Formed in 1997, the Justice Policy Institute (JPI) is a policy development and research body which promotes effective and sensible approaches to America's justice system. JPI has consistently promoted a rational criminal justice agenda through policy formulation, research, media events, education and public speaking. Through vigorous public education efforts, JPI has been featured in the national media. The Institute includes a national panel of advisors to formulate and promote public policy in the area of juvenile and criminal justice. JPI conducts research, proffers model legislation, and takes an active role in promoting a rational criminal justice discourse in the electronic and print media.

Juvenile Rights Advocacy Project

The Juvenile Rights Advocacy Project is a curricular based law clinic at Boston College Law School representing youth at Brighton High School in Boston as well as representing and advocating for equitable policies for girls in the criminal and juvenile justice systems. In our individual representation and policy work on behalf of girls we encounter school failure as a primary pathway into the justice system.

Lawyers For Children

Lawyers for Children (LFC), founded in 1984, is dedicated to protecting and promoting the health and welfare of vulnerable children. LFC provides free, integrated legal and social work services to over 4,000 individual children per year, in a variety of legal contexts. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional training sessions, and seeks systemic improvement of systems affecting vulnerable children. LFC staff have consulted to other child-focused organizations throughout the country. Its offices are in New York, New York.

National Center for Youth Law

The National Center for Youth Law (NCYL) is a private, non-profit legal organization devoted to improving the lives of poor children in the United States. For more than 25 years, NCYL has provided support services to child advocates nationwide and direct representation in cases involving child welfare, public benefits for children and their families, legal issues involving child and adolescent health, fair housing for families with children, and juvenile justice. In particular, NCYL has participated in litigation focused on the needs of youth in the juvenile justice system throughout the country. NCYL also engages in policy analysis, and administrative and legislative advocacy, on both state and national levels.

The Sentencing Project

The Sentencing Project is a national non-profit organization which since 1986 has challenged over-reliance upon the use of jails and prisons and promoted alternatives to incarceration. Its staff, advisors and consultants have closely observed all aspects of the criminal justice and corrections processes. The Sentencing Project has published some of the most widely-read research and information about sentencing and incarceration, including documentation of a highly disproportionate minority representation in the criminal justice system, the unprecedented growth of the American prison population within the last 30 years, and the relative benefits of using therapeutic treatment, rehabilitation, and social programs to reduce crime. In recent years, as direct, non-judicially-reviewed referral to adult criminal court of juvenile-aged defendants has increased, The Sentencing Project has provided guidance to advocates and information to policymakers intended to limit this practice.

University of the District of Columbia, Juvenile Law Clinic

Faculty and students in the Juvenile Law Clinic of the University of the District of Columbia David A. Clarke School of Law represent children in delinquency matters, children and parents in neglect and special education matters in the District of Columbia.

Youth Law Center

The Youth Law Center (YLC) is a national public interest law firm with offices in San Francisco and Washington, DC, that has worked since 1978 on behalf of children in juvenile justice and child welfare systems. YLC has worked with judges, prosecutors, defense counsel, probation departments, corrections officials, sheriffs, police, legislators, community groups, parents, attorneys, and other child advocates in California and throughout the country, providing public education, training, technical assistance, legislative and administrative advocacy, and litigation to protect children from violation of their civil and constitutional rights. YLC has worked for more than two decades to promote individualized treatment and rehabilitative goals in the juvenile justice system, protection of due process rights of youth at risk, effective programs and services for youth at risk and in trouble, consideration of the developmental differences between children and adults, and racial fairness in the justice system. YLC has also worked on issues involving civil and constitutional rights of children in school, and on the consequences of searches and disciplinary procedures that result in students being referred to the juvenile justice system. Therefore, YLC is particularly interested in the issues in this case.

Law Professors

Associate Professor Theresa Glennon of the James E. Beasley School of Law of Temple University. She teaches, conducts research, publishes and speaks on the legal rights of children and youth, specializing in education and family law. From 1985-1989, she was an attorney at the Education Law Center, a private, non-profit advocacy organization for the educational rights of children.

Professor Martin Guggenheim of the New York University School of Law (NYU) is among the nation's pre-eminent scholars, teachers and practitioners in the area of children's law. At NYU, he is Director of Clinical and Advocacy Programs, Executive Director of Washington Square Legal Services (NYU's free legal services program), and Supervising Attorney of NYU's Family Defense Clinic, which seeks to protect vulnerable families from unwarranted governmental intrusion. He directed NYU's Juvenile Rights Clinic for fifteen years, and currently teaches a seminar entitled Child, Parent & State that explores such issues as the rights of young people and the bases for according young people rights that adults have under the Constitution. As a *pro bono* advocate for children, Professor Guggenheim has litigated innumerable cases in the state and federal courts, and served as chief counsel for the following three cases in the United States Supreme Court: *Schall v. Martin*, 467 U.S. 253 (1984), *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), and *Santosky v. Kramer*, 455 U.S. 745 (1982). Professor Guggenheim serves on numerous national and regional boards of directors and advisors for organizations and projects involving children.

Professor Randy Hertz of the New York University School of Law (NYU) is also among the country's leading scholars and teachers in the area of children and the law. He is the Supervising Attorney of NYU's Juvenile Rights Clinic,

and the Editor-In-Chief of the Clinical Law Review, a national, peer-reviewed scholarly journal. Professor Hertz is a current or former member of numerous professional organizations aimed at improving the administration of justice for children. He has published many books and articles on subjects including the legal needs of young people. He is the 2000 recipient of the American Bar Association's Livingston Hall Award for Juvenile Justice Advocacy.

Professor Wallace Mlyniec is the Associate Deal of Clinical Education and Public Service Programs, Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in Family Law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families. Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University.

Professor Francine Sherman has taught juvenile justice at Boston College Law School for the past nine years, and has been directing the Juvenile Rights Advocacy Project at the law school since it was launched in 1995. She is also the Director of the Boston College Center for Child, Family and Community Partnerships. Professor Sherman represents girls in the Massachusetts juvenile justice system and advocates for state system reform that will improve representation for girls and integrate state systems servicing girls.

Professor Joseph B. Tulman is a Professor of Law and Clinical Director at the University of the District of Columbia, David A. Clarke School of Law (UDC-DCSL). Since 1988, he has director the law school's Juvenile Law Clinic. In 1995, he received the law school's distinguished service award. Professor Tulman, since 1987, has been counsel for plaintiffs in Evans v. Williams, a class action of be half of persons with mental retardation. The suit, filed in 1976 led to the closing in 1991 of Forest Haven, a large institution. An agreement, filed by the Evans parties in 2001, establishes and funds a non-profit organization (The Quality Trust for Individuals with Disabilities) to advance the interests of people with disabilities in D.C. With his colleagues in the UDC DCSL Juvenile Law Clinic, Mr. Tulman has pioneered the use of special education advocacy for children in the neglect and delinquency systems. His publications include articles regarding the unnecessary detention of children, and he co-authored and co-edited a comprehensive manual regarding the use of special education advocacy for children in the delinquency system